IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION.

CRIMINAL REVISION APPLICATION 159 OF 2007

Bhimashankar Shivappa Shete ..Applicant.

Vs.

1. Shakuntala Bhimashankar Shete

And

2. The State of Maharashtra ..Respondents.

Mr P. K. Hoshing, Advocate for the Applicant.

Mr K. V. Saste, APP for the Respondent.

CORAM: V. C. DAGA,J.

DATED: 7. 8. 2007.

ORDER
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1. Heard.

2. Perused record.

3. This revision petition is directed against the order dated 13.1.2006 in Criminal Revision Application No.41 of 2001 passed by the I Ad-hoc Additional Sessions Judge, Pandharpur ("the first revisional Court" for short); allowing the Criminal Revision Application and setting aside the order dated 3.2.2001 in Misc. Cri. Application No. 147 of 1993 passed by the learned Judicial Magistrate, First Class, Mangalwedha ("the trial Court" for short);to the extent it

refuses to allow maintenance to the wife under Section 125 of the Code of Criminal Procedure (for short "the Cr.P.C.") and directed payment of maintenance @ Rs. 350/- per month to the respondent-wife Shakuntala with effect from the date of application i.e. 25.11.1993. The parties hereinafter are referred to as husband and wife for the sake of clarity.

FACTUAL MATRIX:
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4. The factual matrix reveals that Shakuntala, wife of the present petitioner Bhimashankar, has filed application under Section 125 of the Cr.P.C. to seek maintenance contending that she is legally wedded wife of the petitioner Bhimashankar and their relations as husband and wife being in existence, the non-applicant husband was liable to provide her maintenance @ Rs. 350/- per month and Rs.500/- towards litigation expenses. The said application came to be registered as Misc. Cri. Application No. 147 of 1993 for being tried by the J.M.F.C. Mangalwedha.

5. On being noticed, the original non applicant-husband (the petitioner herein)

appeared and filed his written statement, admitting marriage but denying liability to pay maintenance to the respondent-wife. He denied all allegations of harassment to the applicant-wife made against him. In defence, he pleaded that the applicant-wife herself had deserted him and went to her parent's house on her own free will. That inspite of all best efforts of reconciliation, she declined to reside and cohabit with him. He has also raised one legal contention that the marriage is ab-initio void; both of them being in prohibited degrees of relationship and that the custom or usage governing each of them did not permit such marriage. Hence their marriage was void in view of section 5 (iv) of the Hindu Marriage act, 1955.

6. With the aforesaid pleadings on record, the application was tried by the Trial Court. Parties were permitted to lead their respective evidence.

7. The applicant-wife examined herself and deposed on oath that her marriage with the petitioner-husband was solemnized in the month of May, 1964. That she delivered two issues.

Her husband (petitioner herein) started ill-treating her and went to the extent of refusing to provide food and necessities of life. He, ultimately, deserted her. That since the year 1972, she has been residing with her maternal relations. She has also deposed that net income of her husband (the petitioner) is around Rs.50,000/-per year. She was cross-examined. Not a single question leading to void marriage was put to the applicant-wife during her cross-examination. The petitioner husband examined himself. He was cross-examined by wife.

8. Based on the evidence brought on record, the parties made their rival submissions before the Trial Court. The trial Court held that the marriage between the two being within the prohibited degrees of relationship is void, as such, the applicant-wife was held disentitled to claim maintenance. With the result, the application came to be dismissed by an order dated 3.2.2001.

9. Being aggrieved by the aforesaid order, the revisional jurisdiction of the District

Court under Section 397 (1) of the Cr.P.C. was invoked by the respondent-wife.

10. The aforesaid first revisional Court, after hearing the parties, came to the conclusion that unless the marriage is dissolved, the applicant wife cannot be denied maintenance. With the result, the application was allowed directing the (present petitioner) -husband to pay Rs.350/- per month to the applicant-wife towards the maintenance from the date of application i.e. 25.11.1993.

11. Being aggrieved by the aforesaid order, revisional jurisdiction of this Court is invoked by the petitioner-husband contending that the marriage being within the prohibited degrees of relationship, the first revisional Court was not justified in reversing the order of the Trial Court and directing payment of maintenance @ Rs. 350/- per month to the wife-original applicant.

SUBMISSIONS:
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12. The learned counsel for the petitioner contends that their marriage being in violation of Section 5 (iv) of the Hindu

Marriage Act, 1955, is void. As such application filed by the applicant-wife was rightly rejected by the Trial Court. He placed reliance on judgments of the Apex Court in the cases of **Khemchand Om Prakash Sharma vs. State of Gujarat and Anr. 2000 SCC 753, Savitaben Somabhai Bhatiya vs. State of Gujarat and Ors, AIR 2005 SC 1809 and** of this Court in the case of **Yamunabai Anantrao Adhav v. Anantrao Shivaram Adhav and another, 1983 Cri.LJ 259 (Bombay)** to contend that the expression "wife" means a "legally wedded wife". If the marriage, itself, is null and void, the applicant does not get status of wife,as such, application under Section 125 of the Cr.P.C. at the instance of applicant is not tenable.

13. The learned counsel for the applicant, thus, contends that the impugned order be set aside and application of the wife-respondent be dismissed and the order of the Trial Court be restored.

CONSIDERATION:-
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14. Having heard the learned counsel for the applicant, undisputed facts are that the

marriage took place in the year 1964. During this period they were blessed with children. Both of them enjoyed their married life without any problem for almost ten years i.e. right upto the year 1972-73. The respondent-wife since 1972 is staying separately, alleging ill-treatment by the husband. Now children are major.

15. The petitioner-husband in his written statement has taken a stand that there is no sufficient cause for the applicant-wife to deny him her company, especially, when he was and is ready to stay and cohabit with her. However, his contention is that wife herself is not ready to join him, as such she is not entitled to claim maintenance under Section 125 of the Cr.P.C.

16. The legality of the marriage is being challenged to hit at the root of the right of the applicant to claim maintenance contending that the marriage between them is void since it is in breach of Section 5 (iv) of the Hindu Marriage Act,1955.

17. As against the above, applicant-wife had

in the Courts below contended that she did have a legitimate cause to stay away from her husband; since he had neglected to maintain her and failed to provide necessities of life, and that she was unable to maintain herself for want of any independent source of income. That is how she has set up her right to claim maintenance.

18. The trial Court, after the trial, has recorded positive finding in favour of the applicant-wife holding that the husband has been ill-treating her. However, the Trial Court rejected application for maintenance only on the legal ground holding that the parties being in the prohibited degrees of relationship and that their custom or usage did not permit such marriage as such marriage being void; she was not entitled to claim maintenance.

19. At this juncture, it is relevant to note that both the Courts below found that the petitioner-husband had ill-treated applicant-wife and that she was justified in staying away from her husband, the petitioner. This concurrent findings of fact is based on

evidence available on record. No submissions were advanced by Mr Hoshing to challenge this particular finding. Even otherwise findings of the Courts below on this count are quite reasonable and possible. The same are based on evidence as such they stand affirmed.

20. As already stated, the learned counsel for the revision petitioner raised solitary legal contention referred to hereinabove revolving around Section 5 (iv) of the Hindu Marriage Act, 1955. which reads as under:-

> Section 5 (iv) :- The parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two :

21. Reading of the above statutory provision makes it clear that marriage can be solemnized between two Hindus, even if they are within the degrees of prohibited relationship provided their custom or usage governing each of them permits such marriage. It is not in dispute that both were married in the year 1964 and have children from the said marriage. The Apex Court in **Gokulchand v/s. Parvin Kumar, A.I.R. 1952 S.C. 231** held that continuous cohabitation of a man and woman as

husband and wife and their treatment as such for number of years may raise the presumption of marriage. The case on hand goes beyond the scope of presumption in view of admission of marriage and children from the said marriage and recognition thereof by the parties and community to which they belong. Not only factum of marriage was proved beyond doubt but recognition thereof by their community leads me to draw an inference that with regard to the existence of custom and usage governing each of them.

22. In the above backdrop, the contention of the petitioner challenging legality of the marriage needs to be examined. Thus, the first question is on whom burden lies to prove the marriage is void. Normally, it lies upon the person who asserts that his marriage is void. The burden of proof lies on the party who substantially asserts the affirmative of the issue and not upon the party who denies it. Applying the same principle, now, the party who alleges absence of custom has to prove the same. The burden to prove defence would thus be on the petitioner husband. He has to prove two ingredients of Section 5 (iv)

of the Hindu Marriage Act: viz; (i) that the parties are within the prohibited degrees of relationship and (ii) that there was no custom or usage governing each of them permitting such marriage. Let me examine, whether or not these ingredients of the said Section are proved by the petitioner-husband.

23. In the instant case, looking to the admission given by the respondent-wife during her cross-examination that the parties are in the prohibited degrees of relationship, the first requirement of Section 5 (iv) of the Hindu Marriage Act stands established and proved by the petitioner-husband. Now let me turn to second requirement of the Section and find out as to whether there was absence of custom or usage governing each of them permitting such marriage between the two. As already observed hereinabove the burden of proof was on the husband since he has alleged that the marriage is void that too after more than 20 years of married life.

24. Petitioner-husband did not put his defence to the applicant-wife in her

cross-examination to seek her version or explanation. No question was asked to her with regard to the existence or non existence of the customs or usage governing them so as to establish that inspite both of them being in prohibited degrees of relations their customs and or usage did not permit such marriage.

25. The petitioner husband examined himself. However, he also did not lead any evidence to show that the custom or usage governing each of them did not permit such marriage. However, in the cross-examinationm, a suggestion was given to him that he is falsely contending that there is no custom in their community to perform such marriages. He denied the suggestion given. By giving this suggestion wife has rightly asserted that their custom permitted such marriage. In other words, their custom did not prohibit such marriage. The denial of the suggestion by the husband does not lead to prove or establish absence of custom. Thus, the petitioner husband has not only failed to rebut presumption but also failed to establish his defence by leading cogent evidence.

26. Apart from the above, considered from another angle, the burden of proof at the beginning of trial always lie on one party, but during the course of trial, it may shift from one side to the other. At the end of the case when both the parties have led evidence then the conflicting evidence is required to be weighed to determine which way the issue can be decided. The abstract question of burden of proof in that event becomes academic. Examined on this touchstone, one has to reach to the conclusion that the petitioner husband has failed to prove his legal defence that marriage is void.

27. The cases relied upon by the petitioner, are the cases; wherein, during the subsistence of the first marriage, the husband had contracted a second marriage. The issue raised and involved was whether second wife was entitled to claim maintenance. In this backdrop, in all cases, second marriage being null and void,it was held that no maintenance application could be allowed in favour of a wife whose marriage, itself was void. Thus, the view taken by the Court below in the case

on hand is reasonable and possible view. No perversity could be demonstrated by the applicant.

O R D E R

The revision application is dismissed with costs quantified in the sum of Rs. 10,000/-. The applicant is directed to pay maintenance right from the date of application (i.e. 25.11.1993) within three months from the date of this judgment failing which amount shall carry interest @ 12% per annum till the payment is made in full and final.

(V.C. DAGA,J.)